

ISSUES

Respondent sets out the following issues in this appeal:

This case was before the Board previously. In the Board's February 23, 2010, Order, a majority of the Board found that the SALJ lacked jurisdiction to review and modify the Award entered September 22, 2000, for the reason that claimant's Application for Review and Modification requested review of a post award medical order dated April 2, 2003, and, as such, the court was without jurisdiction to grant the relief claimant was requesting. Respondent argues that this finding became the law of the case, and the SALJ is without jurisdiction to reverse the Board's finding. In the alternative, respondent argues that claimant's Application for Review and Modification sought to modify an April 2, 2003, order granting claimant post award medical treatment. As the April 2, 2003 Order did not award claimant permanent partial disability benefits, it is not subject to review and modification and the SALJ did not have subject matter jurisdiction.

Further, respondent asserts the SALJ's March 5, 2010, Review and Modification Award should be vacated, overturned or reversed on the basis of the SALJ's inability or refusal to issue an impartial and non-biased decision. Respondent points out that in the Review and Modification Award entered September 15, 2009, the same SALJ found that claimant only had a 12 percent increase to his left upper extremity impairment. In his March 5, 2010, Review and Modification Award, which was based on the same record, the SALJ found that claimant's impairment had increased by 27 percent to the body as a whole. In the alternative, respondent contends claimant has not proven an increase in impairment to his left shoulder from the Award of 13.5 percent entered in September 2000.

Respondent argues that the number of weeks available for a shoulder injury, 225 weeks, had passed more than six months before claimant's Application for Review and Modification was filed and claimant, therefore, is not entitled to review and modification of his scheduled injury.

Respondent next contends that claimant's previous request for post award medical treatment to his cervical spine was denied by the Board in its Order of December 5, 2006,² and that decision was not appealed by either party and is now the law of the case. In the alternative, if the Board finds claimant sustained a general body disability as found by the SALJ on his March 5, 2010, Review and Modification Award, respondent asserts claimant is limited to compensation for 415 weeks from the date of injury. Respondent contends claimant does not have a proper Application for Review on file, and any subsequent Application for Review filed by claimant would be beyond the 415 week period. Therefore, respondent argues that any claim by claimant for a general body disability is barred by the 415 week limitation.

² *Kerby v. The Boeing Company*, No. 250,409, 2006 WL 3891425 (Kan. WCAB Dec. 5, 2006).

Claimant asks the Board to amend the pleadings, specifically his Application for Review and Modification, to be consistent with the evidence and to dismiss or ignore respondent's arguments concerning the SALJ's lack of subject matter jurisdiction. Claimant further argues that the Workers Compensation Act does not state that claimant is only entitled to permanent partial disability for a period of 415 weeks from the date of the injury. Last, claimant asks that the SALJ's finding that claimant had an increase in impairment of 27 percent to the body as a whole be affirmed.

The issues presented by the parties for the Board's review are:

(1) Can the SALJ reverse the Board's February 23, 2010, finding that he did not have subject matter jurisdiction over claimant's Application for Review and Modification?

(2) Did the SALJ lack jurisdiction because claimant's Application for Review and Modification sought to modify a post award medical order entered April 2, 2003, rather than the original agreed Award entered September 22, 2000?

(3) Has the time elapsed for claimant to ask for review and modification of the award because the number of weeks available for an impairment to the shoulder passed more than six months before the Application for Review and Modification was filed?

(4) Did claimant prove an increase in the impairment to his left shoulder beyond the impairment found in the original Award? If so, was the increase in impairment related to his work-related injury of October 22, 1998, or to his non-work related bicycle accident of May 1998?

(5) Is claimant estopped or prevented by the doctrine of res judicata from receiving an impairment for his cervical spine because of either the agreed Award or the Board's December 5, 2006, Order that affirmed ALJ Potts Barnes' Post Award Medical Order finding that claimant failed to prove he needed treatment to his cervical spine as a result of his October 1998 accident? If not, has claimant proven that he has suffered an impairment to his cervical spine as a result of his October 1998 accident and what is the amount and extent of that impairment?

FINDINGS OF FACT

This is the third time this case has been appealed to the Board. In the Board's Order of February 23, 2010, it made the following findings of fact:

Claimant was originally injured in a non-work related accident in May 1998, when he fell while riding his bicycle and suffered a fracture dislocation of his left shoulder. He was treated by Dr. Michelle Klaumann, who performed surgery on the shoulder in May 1998. Claimant was off work until August 15, 1998, when he returned to work with restrictions.

Claimant testified that his supervisor refused to allow him to work within his restrictions. On October 22, 1998, claimant was lifting something at work when the pain in his left shoulder got significantly worse and he could barely lift his arm. Claimant was seen by several doctors, including Dr. John Estivo, who rated him as having a 5 percent permanent partial impairment to his left upper extremity, and Dr. Pedro Murati, who rated him as having a 22 percent impairment to the left upper extremity. Dr. Murati also found that claimant had a cervical strain, which he rated at 4 percent to the whole body. Claimant settled his workers compensation claim with respondent, and an agreed Award was entered on September 22, 2000, giving claimant a 13.5 percent impairment rating to his left upper extremity, which was a split of the upper extremity ratings of Drs. Estivo and Murati. There was no mention in the agreed Award of claimant's claim concerning his cervical spine.

After the entry of the agreed Award, claimant filed seven applications for post award medical and one application for preliminary hearing, which was treated as an application for post award medical. ALJ Potts Barnes issued several orders related to claimant's applications, including an Order of April 2, 2003, in which she held that claimant was entitled to additional medical treatment for his left shoulder. The latest Application for Post Award Medical was filed on July 15, 2004, and requested treatment for claimant's cervical spine and temporary total disability benefits if he was taken off work. On September 6, 2006, ALJ Potts Barnes denied claimant's application, finding he failed to establish his current need for medical treatment for his cervical spine was causally related to his work-related injury of October 22, 1998. The ALJ's Order was appealed to the Board, which affirmed the ALJ, finding:

. . . claimant has failed to prove he needs treatment to his cervical spine as a result of his October 1998 accident or the resulting left shoulder surgery. Nevertheless, the medical evidence establishes that claimant has neck pain and left upper arm pain due to referred pain from the muscles of the shoulder girdle. Accordingly, this Post Award Medical order should not be construed to prohibit claimant from receiving any appropriate physical therapy or medications for that referred muscle pain.³

The Board's Order was not appealed.

On December 31, 2003, claimant filed an Application for Review and Modification of the decision entered April 2, 2003. He specifically asked for modification of permanent partial disability benefits.⁴ That application is the subject of this appeal. A prehearing settlement conference was held on November 17, 2008. The review and modification hearing was held March 24, 2009, before ALJ Potts Barnes. Claimant testified concerning his various doctors visits and

³ *Kerby v. Boeing Company*, No. 250,409, 2006 WL 3891425 (Kan. WCAB Dec. 5, 2006).

⁴ K-WC E-5, Application for Review and Modification, filed December 31, 2003.

treatment, including surgery to replace part of his shoulder in 2003. He testified that he had some improved movement in his shoulder after the surgery. He said his left shoulder is about the same now as it was after the surgery, although the grinding in the shoulder is somewhat worse. Claimant also testified that he believes his left shoulder injury has affected his right shoulder and his neck. He said he has two blown discs in his neck, and his neck has gotten worse over the years, especially on his left side. ALJ Potts Barnes set claimant's terminal date to be April 24, 2009, and respondent's terminal date to be May 26, 2009. On April 22, 2009, ALJ Potts Barnes, by agreement of the parties, extended claimant's terminal date to May 8, 2009, and respondent's terminal date to July 20, 2009. On June 8, 2009, respondent's terminal date was again extended to August 7, 2009. Claimant filed his submission letter on September 10, 2009. Respondent did not file a formal submission letter but simply sent ALJ Potts Barnes an email setting forth its positions on the issues.⁵

The Board's February 23, 2010, Order was not appealed. And although the Board did not remand the matter to the ALJ, the Director nevertheless appointed Mr. Valerius as a Special Administrative Law Judge and assigned this docketed claim to him by an Order of March 2, 2010.

In the SALJ's Review and Modification Award of September 15, 2009, he found that claimant had an increase in functional impairment of 12 percent to his left upper extremity above his original impairment in relation to his work-related injury of October 22, 1998. Respondent appealed the decision to the Board, and the Board reversed and set aside the September 15, 2009, Review and Modification Award for two reasons:

The Board finds that the SALJ lacked subject matter jurisdiction to review and modify the Award entered September 22, 2000, for the reason that the claimant's Application for Review and Modification specifically requested review and modification of the order entered on April 2, 2003, not the Award entered on September 22, 2000. The order of April 2, 2003, pertained only to medical treatment, not to permanent partial disability compensation.

In addition, Mr. Valerius lacked jurisdiction and authority to enter his order of September 15, 2009. He is neither an assistant director nor an administrative law judge. The record is devoid of any order by the Director of the Division of Workers Compensation appointing Mr. Valerius as a special administrative law judge and of any order assigning this case to Mr. Valerius for determination.⁶

The Board did not remand the matter, either to the Administrative Law Judge or to Mr. Valerius.

⁵ *Kerby v. The Boeing Company*, No. 250,409, 2010 WL 769913 (Kan. WCAB Feb. 23, 2010).

⁶ *Id.*

PRINCIPLES OF LAW

In *Reeves*,⁷ the Board stated:

The 1993 Kansas Legislature saw fit to include as a part of the de novo review authority of the Board, the authority to remand a matter to the ALJ.⁸ The Board has concluded this authority should be used sparingly.⁹ In this instance the Board considered the ALJ's findings and reversed that portion of the Award relating to the statutory offset. The matter was then remanded for purposes of determining the remaining issues.

Once the matter was remanded, the ALJ had no authority other than to effectuate and implement the Board's mandate as set forth in its Order remanding the case. Although this issue is one of first impression in the context of a workers compensation claim, there is significant precedent for this rule. Here, the ALJ was authorized solely to consider the nature and extent of claimant's impairment, particularly the work disability pursuant to K.S.A. 44-510e(a). He was not, however, authorized to revisit the statutory offset issue. That matter had been decided by the Board and any further proceedings by the ALJ were directed to be made in a manner consistent with the Board's findings.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that

⁷ *Reeves v. Hallmark Cards, Inc.*, No. 256,002, 2004 WL 769239 (Kan. WCAB Mar. 3, 2004). See *In re Marriage of Bahr*, 29 Kan. App. 2d 846, 32 P. 3d 1212 (2001) "When a district court decision is reversed and remanded for further proceedings, the district court is obliged to effectuate the mandate from the appellate court and may not consider additional matters not necessary to implement the ruling of the appellate court."

⁸ *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P. 3d 425 (2003)

⁹ *Thomas v. Manor Care Nursing Center*, No. 193,777, 1995 WL 715359 (Kan. WCAB Nov. 22, 1995).

the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.¹⁰

K.A.R. 51-19-1 states in part:

(a) When there has been an application for review or appeal upon an award and the same is either affirmed or modified, application for review and modification pursuant to K.S.A. 44-528 may still be made to the division. Initial hearings on such applications shall be conducted by an administrative law judge.

(b) Application for review and modification pursuant to K.S.A. 44-528 shall set forth at least one of the reasons contained therein.

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.¹¹ If there is a change in the claimant's work disability, then the award is subject to review and modification.¹²

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.¹³ Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.¹⁴

The effective date for any modification shall be the date of the increase or diminishment in the functional impairment or work disability except that the effective date shall not be more than six months before the date the application for review and modification was filed.¹⁵

K.S.A. 2009 Supp. 44-523 states in part:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be

¹⁰ K.S.A. 44-528.

¹¹ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

¹² *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

¹³ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

¹⁴ See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

¹⁵ *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 198-99, 83 P3d 1239 (2002).

heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

. . . .

(c) When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. The administrative law judge shall not stay a decision due to the absence of a submission letter. When the award is not entered in 30 days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director or to a special administrative law judge who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within 30 days following submission by the party and assign it to an assistant director or to a special administrative law judge for immediate decision based on the evidence in the record.

K.S.A. 2009 Supp. 44-551 states in part:

(a) The duties of the assistant directors of workers compensation may include but not be limited to acting in the capacity of an administrative law judge.

. . . .

(l) (1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. . . .

(k) In case of emergency the director may appoint special local administrative law judges and assign to them the examination and hearing of any designated case or cases. Such special local administrative law judges shall be attorneys and admitted to practice law in the state of Kansas and shall, as to all cases assigned to them, exercise the same powers as provided by this section for the regular administrative law judges. Special local administrative law judges shall receive a fee commensurate with the services rendered as fixed by rules and regulations adopted by the director. The fees prescribed by this section prior to the effective date of this act shall be effective until different fees are fixed by such rules and regulations.

K.S.A. 2009 Supp. 44-555c(a) states in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS AND CONCLUSION

In its February 23, 2010, Order, the Board found that the SALJ lacked subject matter jurisdiction to review and modify the Award entered September 22, 2000, for the reason that the claimant's Application for Review and Modification specifically requested review and modification of the order entered on April 2, 2003, not the Award entered on September 22, 2000. The order of April 2, 2003, pertained only to medical treatment, not to permanent partial disability compensation.¹⁶ The Board's February 23, 2010, Order was not appealed, and so it is final. The ruling of no subject matter jurisdiction is the law of the case.

The SALJ lacked jurisdiction to enter his order dated March 5, 2010, entitled Review and Modification Award because the Board did not remand the case in its Order of February 23, 2010. Absent an appeal to the Kansas Court of Appeals pursuant to K.S.A. 2009 Supp. 44-556, the Board's Order is final.

Claimant argues that once the Board ruled that Mr. Valerius was without jurisdiction to decide the Application for Review and Modification because he had not been appointed as a Special Administrative Law Judge, the Board was without jurisdiction to rule on the remaining issues, including whether there was subject matter jurisdiction. The Board disagrees. Moreover, judicial economy was better served by deciding the question of subject matter jurisdiction rather than to remand the case for an Administrative Law Judge to make that determination or engage in a pointless exercise of deciding the case on its merits.

The SALJ's order dated March 5, 2010, was entered without jurisdiction or authority and is a nullity.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Special Administrative Law Judge Seth G. Valerius dated March 5, 2010, is reversed and set aside.

IT IS SO ORDERED.

¹⁶ See *Ramirez v. Farmland Foods, Inc.*, No. 177,748, 1999 WL 123222 (Kan. WCAB Feb. 2, 1999).

Dated this _____ day of July, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
 Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
 Seth G. Valerius, Special Administrative Law Judge
 Nelsonna Potts Barnes, Administrative Law Judge